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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

NORTHERN ILLINOIS GAS COMPANY, a Corporation,
Plaintiff-Respondent,

vs.

JOHANNAH H. WIENRANK, DONALD R. WIENRANK, ANNABELL WIENRANK, CLARA CANADY, HERBERT E. MYERS, GOLDIE H. CENTER, WENDELL F. CENTER, CHRISTINE LIETZ, EDWARD LIETZ, MATHILDA ASH, JOHN J. ASH, JOHN C. WIENRANK, ELSIE WIENRANK, JOHN ASH, JERRY ASH, DONALD R. WIENRANK, as Executor of the Estate of Christ J. Wienrank, Deceased,
Defendants-Petitioners.

REPLY BRIEF OF PETITIONERS.

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We regret the necessity of filing a Reply Brief, particularly in view of the length of our original Petition. It is popularly believed by lawyers that a petition for writ of certiorari will not be read if it exceeds 18 pages in length, which ours does. As Abraham Lincoln is said to have stated, a man's legs should be long enough to reach to the ground—and our Petition could not have been

shortened and still presented the constitutional deprivations that occurred. It is incredible to suppose that controversies are accepted by this Court by word count instead of the significance of the matters at issue.

One of the cardinal rules of brief-writing is to speak softly, to understate rather than to declaim, and not to voice indignation even when it reaches the boiling point. However, one thing which this Court is entitled to expect from lawyers admitted to practice before the highest court in the land is integrity. The inversion of terms or use of words to mislead demean not only the Bar but the Court itself, and should not be accepted as true nor escape this Court's attention.

The respondent's brief, for the purpose of making it appear that the "single-user" rule was not presented to the State courts, declares (Respondent's Brief, p. 5):

> "In an effort to overcome these deficiencies in their case, petitioners attempt to inject the question of whether the State can exclude consideration of use of their land as an underground gas storage reservoir in determining the compensation to be awarded them on the ground that the State would not permit any possible user other than respondent to develop such a reservoir. Respondent did not advance such a ground before the Appellate Court (Brief of Appellees), and, as will be shown, the Appellate Court did not rely on such a ground. In short, that question is simply not involved in this case."

The landowners are the petitioners in this Court; they were the defendants in the state court. The question is not what the utility company argued in the state court but the issues presented by the landowners. As pointed out in the Petition for Writ of Certiorari (pp. 4-9, 25, 26, 29, 31), this question was squarely presented to the trial court and ruled upon by the trial court (Abst. 107, 111, 112) which

held explicitly that since Northern Illinois Gas had received a permit to store gas in that area, the trial court would receive no evidence relating to value of such gas storage although there was an active competitive market in existence. We claimed then, and claim now, that such ruling deprived us of due property without due process.[1]

In the state court appeal, it is true that the respondent (Northern Illinois Gas Company) attempted to dodge this issue; it did (Appellee's Brief, p. 20) rely expressly on *Buckles* and *Mason* to circumvent this point.

Let us clarify any confusion which may exist. No briefs were filed in the Illinois Appellate Court. The appeal, because of the constitutional questions, went directly to the Supreme Court of Illinois in which all briefs were filed. That Court, because of *Buckles* and *Mason*, refused to consider the constitutional issues and transferred the case to the Appellate Court. That Court stated, in part (66 Ill. App. 2d 60 at 72):

> "In the scholarly brief presented by Defendants it is suggested that this court overrule the Buckles and Mason decisions at least as applied to the facts before us in the instant case."

And, at page 78, that court stated that the decisions above cited: "are precedents which are directly applicable to the cause before us."

To show further that respondent utility company's assertion that landowners now "attempt to inject the ques-

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[1] As to the citation of Bauman v. Ross, 167 U. S. 548, cited in footnote 1 by the respondent, we direct this Court's attention to **Constitution of the United States of America**, published by the Library of Congress, p. 872 which cites such decision for the following proposition: "Where property is taken by the United States in the exercise of the power of eminent domain, but without condemnation proceedings, the owner may, under the Tucker Act, bring suit for just compensation in the Court of Claims or in a district court sitting as a Court of Claims."

tion" is inaccurate, we are herewith filing and have sent to the Clerk of this Court ten copies of our brief in the Illinois Supreme Court, so that they will be readily available for examination by this Court. One copy thereof has already been certified by the respondent, so that identity of such briefs is not a question. The contentions we advance here were propounded in the state court in even more elaborate detail (pp. 2-8, 23-58).

The respondent then says (p. 5): "In short, that question is simply not involved in this case."

Such misstatements to this Court are unworthy of able lawyers. However great their success may be in a metropolitan area, their duty to a tribunal before which they appear never alters. They are officers of the court and owe a duty of fidelity to it. Accordingly, I apologize for my brothers who oppose me in this case and ask this Court to consider the contentions as shown by the Abstract, by the Petition, and by the briefs in the state court —all of which have been filed herein.

We find a somewhat similar approach in footnote 2 on that same page of respondent's brief. It states that: "An expert offered by respondent testified that petitioners' land could not be used for underground gas storage other than in combination with the land of others to form the large storage dome which respondent is seeking to develop."

However, when the landowners offered expert testimony as to the same matter, such testimony was excluded (Abst. 163). In the trial court, there was a strange type of unilateral proof—all evidence offered by the utility company was received; evidence to the contrary, offered by the landowners, by equally as well-qualified witnesses, was excluded. Almost all of the evidence upon the issues had to be made by offers of proof to protect the record.

At another place (p. 6), the respondent states that the pertinent issue in *Buckles* rests upon the *Powelson* case. This is in error. We have no quarrel with that aspect of *Powelson*—and, had the trial court followed *Powelson*, it would have received the expert testimony of Dr. Carl A. Sherman (Abst. 112, 113) and of Dr. Carl A. Bays (Abst. 162, 163) as to the reasonable probability of the lands being considered with other tracts for gas storage.[2] *Buckles*, for the first time, announced a new rule—and that was that such combination could not be considered because it, the State, had licensed a specific utility company to take advantage of such use—hence all evidence of value therefor became irrelevant. And, in reaching that startling conclusion, *Buckles* did not rely on *Powelson* (see Appendix to Petition, p. 21). It cited only one decision, which had nothing to do with that issue, namely, United States v. Virginia Electric & Power Co., 365 U. S. 624. That case dealt solely with the matter of navigational servitude.

It is interesting to note that in respondent's footnote 3 (p. 8 of Respondent's Brief), it falls into precisely the same error. In relying upon United States v. Twin City Power Co., 350 U. S. 222, respondent fails to recognize that such decision turns on exactly the same point of navigational rights, this Court stating at 224, 225, 227, 228:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' (citing cases) or 'a superior navigational easement.' * * * We deal here with the fed-

[2] *Powelson* points out, incidentally, at page 283 that the United States need only pay for property taken, whereas a state or one licensed by the state must pay for damage to or diminution in value as well as for that which is taken.

eral domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. * * * What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys."

Accordingly, that citation is no more relevant than the *Virginia Electric* case. The latter was cited by the utility company in *Buckles* to confuse the Illinois courts and and succeeded in doing so. It is strangely disrespectful to cite to this Court one of its own decisions in an effort to confuse it. Respondent also fails in its analysis of *Grand-Hydro* to distinguish between situations where the United States is the taker (holding control of the navigable waters) and the situation where a state, state agency, or private corporation seeks to take the property of another. In all events, as repeatedly stated, we are not here concerned with navigable waters but with the value of subsurface property rights for which there is an existing market but as to the existence of which value all evidence was excluded.

The respondent asserts that the Illinois court did not mean what it said in *Buckles* and *Mason*. At one point, it is stated that the above matter was merely an "alternative" basis for decision in *Buckles*. Even if this were accurate, such is immaterial when the trial court followed such reasoning to exclude all evidence presented by the landowners on this ground (Abst. 107, 111, 112). This court has the power, if any ambiguity exists, to remand this case to the Illinois courts for clarification of this matter, Mental Hygiene Department v. Kirchner, 380 U. S. 194. However, it is immaterial what was said in *Buckles* or *Mason*. What matters here is the construction which the trial court placed upon the language of the *Buckles* case and its rulings in excluding all proper testimony and in denying all offers of proof relative to value, feasibility of

combination of interests, potentiality of irrigation and the effect of the destruction of water resources thereon, and damage caused to market value from the reasonable fears of fires and explosions. The constitutional deprivation occurred in the trial court, and the reviewing courts of Illinois expressly approved what it had done. As we stated earlier, property rights were once considered as important as civil rights—although at least one writer, as well as the respondent, seems to believe that property rights are disappearing with the blessing of this Court, Schwartz, Bernard, *A Commentary on the Constitution of the United States,* 1965, MacMillan, Part II, "The Right of Property," Volume III, p. 233.

A court of much lesser statute than this Court pointed out in Robertson v. City of Sullivan, D. C. Ore. 1961, 191 F. Supp 604, that an ordinance was invalid which zoned an area of land so as to prohibit commercial development although it was located within a commercial area—such zoning having occurred at the request of the State of Oregon, so as to hold down the cost of acquiring land for state office buildings. So it is here. A state may, under its police powers, acquire property. Likewise, it may invest others with this power—**but not without full and fair payment.** And that payment must embrace the fair cash market value of every facet of that of which the owner is deprived. The "single purpose" and "single bidder" rules which were adopted by the trial court manifestly are inconsistent with the constitutional guarantees conferred upon citizens. The very fact that the plaintiff utility company sought and received a "perpetual *assignable* easement" is a recognition that companies or persons other than the plaintiff alone were or reasonably could be interested in the property as such. The jury was not permitted to hear any testimony upon the areas covered by our offers of proof in better arriving at the value of that which was taken. We do not say that the jury had to

accept either our theory or the figures of our experts. But we do say that no State can, by certificating a utility company, destroy the concept of marketability which is the conventional test in eminent domain, nor preclude the consideration of any factor which enters into the question of value. A jury may accept or reject any theory or any body of evidence proffered, provided its action is not capricious. But it has a right to hear the testimony, or the constitutional right of jury trial in condemnation cases has ended.

Let us be sure that we understand each other upon this point—that we are talking the same language. Of course, a certificate can be issued to a single utility company for almost any type of franchise. That is not the question. By doing so, however, the State cannot say: "there is no longer a competitive market, so that any figure named by the utility company or by its witnesses must control." If, under free and competitive bidding, numerous buyers would find the property desirable and bid against each other to secure it, the highest price which would be paid by such willing buyer, plus the damages to the remaining property, remains the criterion of value. Otherwise, the State has knocked the stuffings out of value and permitted a taking without compensating the owner for the property's true worth.

Obviously, the favored utility company can dispute our assertions in court. It may bring forward evidence to attempt to prove that the property is inherently valueless or that others would pay only a nominal price for it. But it cannot prevent, nor can a trial court prevent, the reception of evidence to show the value of the thing taken for its highest and best use, if it is of intrinsic value to many possible buyers, and not to the respondent alone—or the test of eminent domain becomes a sham. The sacred promises of constitutional guarantees become parrot phrases uttered by black-robed men which are utterly

meaningless to protect the rights they were drafted to preserve.

There can be no doubt but that Dr. Bell, Dr. Bays, Dr. Bretz, Harmon Smith, Sylvester Beaupre, Harold Sense, and the other persons of expert qualifications whom we proffered—and whose testimony was preserved by proper offers of proof—could greatly have assisted the jury in its consideration of the questions of property uses and property values. Perhaps the jury would not have accepted their testimony, particularly if vigorously cross-examined by able counsel. But at least it has the right to be informed upon the subject so that it may make the determination of these important factual issues. A trial limited to the theory and evidence of one side is no trial at all.

The trial court cannot be subjected to too much criticism for his rulings in this case. He had no choice but to follow the *Buckles'* decision—and that decision was clearly wrong. *Buckles* cited no authority for its support except one navigational servitude decision, which had no place in such consideration. Apparently the Court's attention in *Buckles* had not been called to Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359, since it makes no reference to that decision. They are diametrically opposed to each other; and if *Grand-Hydro* was correct, then *Buckles* was wrong and the trial court in this case was wrong. No person other than an academician adroit enough to select the number of angels who can stand on the head of a pin could find a distinction between the two cases. Cuteness and niceties have no place in jurisprudence when a battering ram has been used to overthrow a controlling precedent laying down the only possible result consistent with constitutional principles.

The respondent utility company states that the landowners have been adequately compensated at the rate of

approximately $75 per acre for the loss of rights which they were not presently utilizing. If those rights were, in fact, worth $1,000 an acre, then such a statement is absurd. And no person can determine the matter of value except a jury which has been permitted to consider the existence of a competitive market (if one does exist, and testimony was offered to that effect) and the values possessed upon such market. Again, one is not limited to present uses, but the jury may consider the total of concurrent uses to which the property is reasonably susceptible of being adapted. I may have oil under my land, but prefer to wait until my declining years to commercialize it, or leave it in place for my children. However, another cannot deprive me of that property without adequate payment. So far as irrigation is concerned, the offers of proof show that irrigation is going on in numerous places in that immediate area as shown by witnesses Cultra and Hoekstra; further, at least two of these landowners had secured deep-well permits for this purpose. Under this Court's decision in *McCandless,* this evidence should have been received. And, finally, what shrinkage occurs to value when one sits over a powderkeg? After being familiarized with the facts of the fires and explosions in other underground gas storage projects of which the photographs in the Abstract are representative (Abst. 183, 195), and the destruction of glacial drift water wells in those areas, many would not purchase such lands at any price. The testimony of realtors as to the effect of these factors upon the fair cash market value of these lands again was excluded.

As to the other points discussed by respondent, no reply is required. The Petition amply covers those points and demonstrates the inaccuracy of the generalities in respondent's brief.

I do not ask that this Court be joyous concerning the bluntness of my expressions either in the original petition

or in this brief. But no lawyer, if he possesses integrity, can be so gutless as to be a gentleman first and an advocate second. Censure me if you like, but hear this case. For when you do, you will reverse it.

Respectfully submitted,

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